

## MEMORANDUM OF LAW

DATE: January 20, 1993

TO: Christiann Klein, Executive Director, Human  
Relations Commission

FROM: City Attorney

SUBJECT: Duties of City Attorney

By memorandum dated November 24, 1992, you asked this office for a legal opinion on two questions relative to enforcement of the Human Relations Commission Ordinance ("Ordinance") and the Human Dignity Ordinance ("HDO"). Specifically, you have asked if the City of San Diego's Charter, or any other legal rule, prohibits the City Attorney from initiating enforcement action under section 52.9609, subdivision (b)(2) of the Human Dignity Ordinance, upon proper referral by the Human Relations Commission, without prior direction from the City Council? You have also asked what is the appropriate application of Charter section 40, which provides that "It shall be his duty, either personally or by such assistants as he may designate, . . . to prosecute for all offenses against the ordinances of the City . . . ?"

### BACKGROUND

In August 1992, Officer Chuck Merino was expelled from his Eagle Scout Advisor position by the Boy Scouts of America ("BSA") based upon his sexual orientation. Subsequently, the Human Relations Commission voted to, and did, send a resolution to the City Council asking the Council to enforce the compliance with laws clause of the BSA leases on Fiesta Island and in Balboa Park. The request was predicated on the BSA's alleged violation of the HDO. Additionally, the Human Relations Commission sent a letter to City Attorney John Witt, asking him to seek injunctive relief pursuant to the enforcement provisions of both the HDO and the Ordinance. Your questions arose as a result of these requests by the HRC. At this time, the City of San Diego is a defendant in a lawsuit filed by Officer Merino and the Office of the City Attorney is defending the City. Therefore, it would be inappropriate for this office to comment on the merits of a

matter that is the subject of pending litigation. Nevertheless, the following analysis answers your questions concerning the responsibilities of the Office of the City Attorney under the Charter in general terms.

#### ANALYSIS

The San Diego City Charter ("Charter") outlines the duties of the City Attorney. Specifically, Charter section 40 states: "It shall be his duty . . . the City Attorney to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of him by law . . . ." (Emphasis added.)

Charter section 40.1 grants the City Attorney concurrent jurisdiction with the District Attorney to prosecute persons charged with violation of the state laws within the City limits for offenses constituting misdemeanors.

Under these sections, if the City Attorney is prosecuting a criminal action, he acts on behalf of the people of the State of California. If the City Attorney is prosecuting an administrative action, he acts on behalf of the City of San Diego. In most civil actions the City Attorney represents the City, however, depending upon the nature of the cause of action and the underlying statutory authority, he may represent the people of the State of California.

Irrespective of the nature of the underlying authority for the City Attorney to act, he is vested with certain discretionary powers. For example, the language of the Charter indicates the City Attorney shall prosecute all offenses against the ordinances of the City. Use of the word shall usually indicates that these duties are mandatory and that the City Attorney has no choice but to act in such instances. However, the courts have repeatedly stated: "The district attorney where City Attorney must be vested with discretionary power in investigation and prosecution of . . . such charges." *Taliaferro v. City of San Pablo*, 187 Cal. App. 2d 153, 154 (1960).

Although prosecution is generally associated with criminal matters, civil prosecutions of certain ordinances do occur, such as in the areas of noise or nuisance abatement and the HDO. As in criminal cases, prosecutorial discretion in civil prosecutions is permitted. The discretion is, in fact, greater than in criminal prosecutions because a party to a civil wrong may always choose to forego legal action on the alleged wrong. In discussing the parameters of a prosecutor's discretion in *Taliaferro v. Locke*, 182 Cal. App. 2d 752 (1960), a case

involving a citizen who attempted to force a district attorney to prosecute a case through a court ordered writ of mandamus, the court clearly stated that a prosecutor is vested with broad discretionary powers and the court will not second guess a district attorney's decision not to prosecute by compelling prosecution through a writ of mandamus.

Both the HDO and the Ordinance recognize that the City Attorney is vested with discretion in enforcement proceedings. The remedies provided in both the Ordinance and the HDO are civil in nature, no criminal sanctions are provided. Specifically, the Ordinance at section 26.0908(e) provides: "The City Attorney or other appropriate prosecutorial or regulatory entity, in its discretion, may proceed to secure from an appropriate court an order enjoining the defendant(s) from continuing or repeating such practice." (Emphasis added.)

The HDO enforcement section similarly provides in pertinent part at section 52.9609(2): "An action for injunction under this section may be brought by any aggrieved person, by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class." (Emphasis added.)

The language of the enforcement provisions of the Ordinance and the HDO indicate that the duty of the City Attorney to civilly prosecute violations of the Ordinance is discretionary. No mandatory language is employed. In cases where mandatory language is evident, the courts have said: "Of course, when a statute clearly makes prosecution mandatory, as upon direction of the board of supervisors to proceed under the Red Light Abatement Act, the district attorney can be compelled to act." *Taliaferro v. City of San Pablo*, 187 Cal. App. 2d 153, 154-155 (1960). Such is not the case in this instance, the plain language of the Charter indicates that although the City Attorney may seek injunctive relief on a contract, whether pursuant to a violation of an ordinance or as a result of a breach of contract, he is not compelled to do so.

The City Attorney, as an independently elected official, has broad discretionary power. He is not, however, empowered to act as a policymaker on behalf of the City. In matters similar to the one you present, where a decision to proceed with a legal action is not mandated by law but turns on a question of policy, it is in the best interest of the City for the City Attorney to act in concurrence with the guidance of the City Council. This does not mean that the City Attorney is without the power to act on his own, rather, it is an indication that in certain instances he may choose to confer with the policy-making body and receive

direction on priorities. This is especially true when the City of San Diego is already a party to a civil lawsuit arising out of the same set of circumstances.

The Human Relations Commission is an advisory commission to the City Council and City Manager pursuant to SDMC section 26.0902. Thus, in matters of City policy, the appropriate action for this Commission would be to recommend to the City Council that the City of San Diego act in conformance with the views of the Commission.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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